IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2972 of 1985

with

SPECIAL CIVIL APPLICATION No 3013 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHHAGANBHAI PANCHABHAI

Versus

DOLATI GROUP MULTI-PURPOSE CO-OPERATIVE SOCIETY

Appearance:

1. Special Civil Application No. 2972 of 1985

MR BM MANGUKIYA for Petitioner No. 1-3

MR SHIRISH JOSHI for Respondent No. 1

..... for Respondent No. 2,3,4,6,7

MR GM JOSHI for Respondent No. 2/1

UNSERVED-REFUSED (N) for Respondent No. 2/1-2/3,7/1-2/3

MR JD AJMERA for Respondent No. 3/1-3/6

RULE UNSERVED for Respondent No. 4/1-4/9

RULE SERVED for Respondent No. 5

SERVED BY AFFIX.-(R) for Respondent No. 6/1-6/3

2. Special Civil Application No. 3013 of 1985

MR JD AJMERA for Petitioner No. 1

MR SHIRISH JOSHI for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 21/12/2002

COMMON ORAL JUDGEMENT

Leave to add Collector, Amreli and Collector, Bhavnagar as respondents No.8 and 9 in both these petitions.

At the suggestion of the Court, Ms Manisha Lavkumar learned AGP waives service of rule for the newly added respondents.

In the facts and circumstances of the case, since no directions adverse to the said authorities are required to be issued but only they are required to decide a particular controversy which is delaying the execution of the award passed by the Board of Nominees as confirmed by the Tribunal, the Court does not think it necessary to grant any time to the said authorities.

2. In both these petitions, purporting to be under Articles 226 and 227 of the Constitution, the petitioners have challenged common judgment and order dated 31-12-1984 passed by the Gujarat State Cooperative Tribunal in Appeal Nos. 175 and 202 of 1982 against the judgment and award passed by the Board of Nominees in Lavad Suit No. 429 of 1980. The said suit was filed by respondent No.1 herein, Dolati Group Multipurpose Cooperative Society, the Society registered under the Gujarat Cooperative Societies Act, 1961 (hereinafter referred to as `the Act'). The suit was filed by its Administrator and Liquidator for recovery of sum of Rs.3,02,357-86 with running interest at the rate of 12%p.a. from the date of the suit till payment/realisation from the heirs of former President of the Society - Bhikhabhai Rudabhai (who had died in 1975), the heirs of Pancha Mula (who had died on 1-4-1968) and from Bhanabhai Ramjibhai Jadeja, the former Secretary of the Society at the relevant time. The Board of Nominees passed common judgment and award holding that all the three defendants were jointly and severally liable to pay the Society Rs.3,02,357-86 with running interest at the rate of 12%p.a. from the date of the suit till payment/

realisation. The said common judgment and award dated 21-5-1982 came to be challenged before the Gujarat State Cooperative Tribunal in Appeal Nos. 175 and 202 of 1982 filed by the heirs of Pancha Mula and the heirs of Bhikhabhai Rudabhai respectively and also by Bhanabhai Ramjibhai Jadeja in Appeal No.213 of 1982. The Tribunal by the impugned judgment dated 31-12-1984 dismissed all the three appeals. However, Bhanabhai Ramjibhai Jadeja, the former Secretary, has not filed any petition for challenging the said judgment and order of the Tribunal and the present two petitions have been filed only by the heirs of Pancha Mula and by the heirs of Bhikhabhai Rudabhai.

3. Mr JD Ajmera, learned counsel for the heirs of Bhikhabhai Rudabhai (the petitioners in Special Civil Application No.3013 of 1985) has submitted that at the relevant time, Bhikhabhai Rudabhai was the President of the Cooperative Society in question for a very short period and that the President himself was not supposed to keep the cash with him or to look after the day-to-day management of the Society or its accounts. It is submitted that when the Secretary himself i.e. Bhikhabhai Ramjibhai Jadeja was incharge of the cash, Bhikhabhai Rudabhai could not have been held to be responsible for the loss caused to the Society.

4. Mr Mangukiya for original defendant No.3, the heirs of Pancha Mula has submitted that the Secretary was incharge of the accounts of the Society and he had even stated before the Cooperation Officer on 4-4-1969 that there was only one Rojmel for the cash transactions of the Society and also for the godown transactions of the Society and that there were no two separate Rojmels. During evidence before the Board of Nominees, the Secretary resiled from the said stand and stated that Pancha Mula did not furnish the Secretary with the Rojmel pertaining to the godown after 30-11-1965. It is further submitted that the responsibility of Pancha Mula and his heirs has been fixed only on the basis of a statement made by Chhagan Pancha (son of Pancha Mula) before the Cooperation Officer that some books of accounts were being written on village Goradka and that one such register may still be there but it was not found and, therefore, the Board of Nominees and the Tribunal have drawn adverse inference against Pancha Mula. It is submitted that both the Board of Nominees and the Tribunal have thrown the burden of proof on the heirs of deceased employee of the Society but even in civil cases, the burden of proof is on the plaintiff to prove that the loss in question was caused by an act or omission on the

part of Pancha Mula.

5. In reply, Mr Shirish Joshi for the respondent Society submitted that the President and Secretary of the Society i.e. defendants No.1 (Bhikhabhai Rudabhai) and 2 (Bhanabhai Ramjibhai Jadeja) have failed to convene any general meeting of the Society after 21-5-1965 nor have they convened the meeting of the managing committee after 2-10-1964 nor was any Rojmel written for the period after 29-11-1965 till the administrator took over on 29-4-1969, and, therefore, this is a clear indication that all the three defendants had acted in collusion with each other and in any case, the Society is not required to prove the role played by each of the three defendants so long as it is clear that the amounts taken for the Society were not accounted for.

6. What emerges from the record is that Bhikhabhai Rudabhai was the President of the respondent - Society and Bhanabhai Ramjibhai Jadeja was the Secretary of the respondent - Society. Both the said persons were, therefore, incharge of the management of the Society. Bye-law No.45 of the Bye-laws of the respondent - Society required the Secretary to prepare daily rojmel and ledgers and to obtain the signatures of the President thereon and also to convene the meetings of the Society and the meetings of the Managing Committee of the Society. The said bye-law also required the Secretary to maintain the accounts and registers and to place the same for approval of the Managing Committee at the end of each month and also to get the accounts audited and to meet with the objections of the auditors. It is, thus, clear that the responsibility for the financial transactions was placed both on the Secretary and on the President though the primary responsibility was placed on the Secretary. The very fact that no annual general meeting of the respondent - Society was convened after 25-1-1965 and even the meetings of the Managing Committee of the respondent - Society were not convened after 2-10-1964 and the rojmel was also not at all written for the period after 29-11-1965 - is sufficient indication of the dereliction of duty not only on the part of the Secretary but also utter failure in supervision on the part of the President of the respondent - Society. On account of these serious lapses, the accounts of the respondent Society were not written from 30-11-1965 till 27-9-1969 when the charge of the respondent - Society was taken over by the Administrator who was appointed by order dated 14-5-1969. In the meantime, on 4-4-1969, the Assistant Cooperation Officer of the State Government had also recorded the statements of various persons including

Bhanabhai Ramjibhai - the former Secretary. On that day, the said former Secretary had admitted that for the last many years, the cash as well as the books of accounts of the respondent - Society were lying in his custody and that a common rojmel was being maintained for the cash transactions and also for the godown and it was for the Secretary to take the accounts from Pancha Mula about the commodities purchased, stored in and sold from the godown. In the said statement dated 4-4-1969 also, the Secretary had admitted getting Rs.2,40,000/- from the bank on 4-12-1965 and dealing with the same. It was not the case of the Secretary on 16-6-1968 before the Assistant Inspector, Vijpadi (Page 163 of the Paper Book) that he had paid the amount for purchasing the commodities and had got the commodities delivered in the godown and that those commodities were not accounted for by Pancha Mula. It was also not the case of the Secretary that he had no access to the commodities lying in the godown. Admittedly, Pancha Mula was only an employee of the respondent - Society and was not a member of the Managing Committee nor any office bearer.

7. Having heard the learned counsel for the parties, it appears to the Court that while there is substance in the contention of the plaintiff- Society and the findings given by the Board of Nominees as well as the Tribunal that the President had failed to discharge his duties in supervising the work of the Secretary who was required to maintain the accounts and the cash and who had never made any grievance till 1969 that Pancha Mula had not supplied any Rojmel or accounts to the Secretary and, therefore, the President can also be said to be responsible for the loss caused to the Society as contemplated by Section 96 (2)(iii) of the Act. However, there is some substance in the submissions made by Mr Mangukiya that the case against Pancha Mula was not proved and that the Board of Nominees and the Tribunal erred in throwing the burden of proof on Pancha Mula who had already died on 1-4-1968 and consequently upon upon his heirs. It is true that there is reference to some accounts being written at Goradka, however, that is a circumstance which can only create some suspicion but even in civil matters the plaintiff must prove the case on preponderance of probabilities and, therefore, mere suspicion cannot take the place of proof. Whether the loss caused to the Society to the tune of Rs.3 lacs and odd amount was on account of any misappropriation or defalcation by the Secretary alone or whether anybody had helped the Secretary in this activity, when the Secretary himself has chosen not to enter the witness box, the Board of Nominees and the Tribunal were not justified in fastening the

responsibility on the heirs of Pancha Mula merely by making some reference to the statement made by Chhagan Pancha, one of the sons of Pancha Mula, about the account book being written at village called Goradka.

8. In view of the findings given by the Board of Nominees and the Tribunal that it was defendant No.2 who was the person who was really responsible for the loss caused to the Society and, therefore, his liability was primary and the liability of defendant No.1- President was only secondary by way of failure in supervision, it would be just and proper to direct respondent No.1 Society to first proceed against defendant No.2 Secretary and to take all necessary steps for this purpose within six months from today and thereafter if the recovery from the heirs of defendant No.2 is not sufficient then and thereafter to proceed against the heirs of defendant No.1 in respect of the properties inherited from the deceased.

9. Mr Joshi for the Society states that although there is no stay against execution of the award against defendant No.2 - former Secretary it is on account of the dispute relating the jurisdiction of the Collector, Bhavnagar and Collector, Amreli that the award against even defendant No.2 has not been executed in the last five years because Savarkundla taluka is now shifted from Bhavnagar district to Amreli district.

10. In view of the fact that the dues sought to be recovered by the respondent- Society are outstanding from original defendant No.2 (Bhanabhai Ramjibhai Jadeja) since 1969 as per the award passed by the Board of Nominees as far back as in the year 1982 and confirmed by the Tribunal in 1984 and defendant No.2 Bhanabhai Ramjibhai Jadeja has not even challenged the judgment and award for the last 16 years, the Collector, Amreli and the Collector, Bhavnagar shall look into the matter and take a final decision as to which Recovery Officer is to execute the award passed by the Board of Nominees against defendants No.1 and 2 in Lavad Suit No.429 of 1980. This shall be done within one month from the date of receipt of the writ of this Court or a certified copy of this order, whichever is earlier.

Whatever decision is taken by the Collector Bhavnagar and Amreli about execution of the award against defendant No.2 and heirs of Secretary, shall obviously apply to the execution of the award against the heirs of defendant No.1 as well.

11. In view of the above discussion, subject to the

directions given in paras 8 and 10, Special Civil Application No.3103 of 1985 filed by the heirs of Bhikhabhai Rudabhai is hereby dismissed.

Rule is discharged with no order as to costs.

12. Special Civil Application No.2972 of 1985 is allowed. The judgment and award passed by the Board of Nominees as confirmed by the Tribunal against heirs of Pancha Mula is set aside.

Rule is made absolute with no order as to costs.

(M.S. Shah,J)
zgs/-